

EDMUND G. BROWN JR.
Attorney General of California
J. MATTHEW RODRIQUEZ
Chief Assistant Attorney General
KEN ALEX
Senior Assistant Attorney General
MARGARITA PADILLA
Supervising Deputy Attorney General
SANDRA GOLDBERG, State Bar No. 138632
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2145
Fax: (510) 622-2270
E-mail: Sandra.Goldberg@doj.ca.gov

*Attorneys for Plaintiff
California Department of Toxic Substances Control*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**ATCHISON TOPEKA & SANTA FE
RAILWAY COMPANY,**

Plaintiff,

v.

HERCULES INCORPORATED et. al.,

Defendants.

No. CV-F-96-5879 OWW/ DLB
(Consolidated With CV-F-98-5050 OWW)

**STIPULATION FOR DISMISSAL OF
CLAIMS AND ORDER**

Trial Date None

The California Department of Toxic Substances Control ("DTSC"), The Dow Chemical Company ("Dow"), Shell Oil Company and/or Shell Chemical Company ("Shell"), Hercules, Incorporated ("Hercules") and BNSF Railway Company (formerly Burlington Northern and

1 Santa Fe Railway Company, and successor to Atchison Topeka & Santa Fe Railway Company)
 2 (“BNSF Railway”) collectively referred to herein as the “Parties,” hereby stipulate and agree as
 3 follows:

4 A. DTSC filed a Complaint in this action against Dow, Shell, Hercules and BNSF
 5 Railway (jointly “Stipulating Defendants”) on January 14, 1998 in connection with the
 6 environmental cleanup of the Brown & Bryant Shafter Site, in Shafter, CA (“the Shafter Site”).¹
 7 DTSC filed a First Amended Complaint on March 9, 1998 and a Second Amended Complaint on
 8 November 6, 1998 (the Complaint and Amended Complaints are jointly referred to as
 9 “Complaint”).² The Complaint seeks recovery of DTSC’s response costs and declaratory relief
 10 under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C §
 11 9601 *et seq.* (“CERCLA”), arising from alleged releases and threatened releases of hazardous
 12 substances at and from the Shafter Site. The Complaint also seeks civil penalties under California
 13 Health & Safety Code § 25359.2 for non-compliance with the Imminent or Substantial
 14 Endangerment Determination Order and Remedial Action Order, In the Matter of: Brown &
 15 Bryant, Inc., 135 & 140 Commercial Drive, Shafter, CA, issued by DTSC on July 23, 1993 (“ISE
 16 Order”).

17 B. The Stipulating Defendants filed their respective Answers to the Complaint. Dow
 18 also filed counterclaims against DTSC and a third party complaint against the Hazardous Waste
 19 Control Account and Hazardous Substances Account, on April 4, 1998. Dow filed First
 20 Amended Counterclaims against DTSC on May 5, 1998, and filed a Notice of Voluntary
 21 Dismissal of its third party complaint against the Hazardous Waste Control Account and
 22 Hazardous Substance Account on that date. The Court entered the order of dismissal on May 12,
 23 1998. Hercules filed counterclaims against DTSC and cross-claims against BNSF Railway on
 24

25 ¹ DTSC’s Complaint was originally numbered CV-F-98-5050-OWW-DLB; it was
 consolidated with the already pending action numbered CV-F-96-5879-OWW-DLB. (Minute
 Order, May 7, 1998).

26 ² DTSC’s Complaint included claims against additional defendants. DTSC settled its
 27 claims against Chevron Chemical Company (Orders Approving Settlement, filed October 4 and
 28 26, 1999) and dismissed its claims against Novartis and Ciba-Geigy Corporation (Order
 Dismissing Claims, filed January 28, 1999 and Stipulation Substituting Party, April 2, 1998).

1 October 30, 1998. BNSF Railway filed cross-claims against a number of parties, including Shell,
2 Dow and Hercules, on May 6, 1998 and filed amended cross-claims on November 9, 1998.
3 DTSC filed a motion to dismiss Dow's Counterclaims on June 5, 1998. That motion was argued
4 on August 24, 1998, and is still pending.

5 C. When DTSC's Complaint in this action was filed, it was related to pending cases in
6 this court involving claims arising from releases and threatened releases of hazardous substances
7 from the Brown & Bryant Shafter Site and from another location where Brown & Bryant
8 conducted business, in Arvin, CA ("the Arvin Site"). The claims related to the Arvin Site were
9 tried from March through September 1999, and judgment was entered by the district court on
10 September 10, 2003. The judgment was appealed to the U.S. Court of Appeals for the Ninth
11 Circuit (*U.S. v. Burlington Northern and Santa Fe Railway Co.* (9th Cir. 2008) 520 F.3d 918),
12 and the U.S. Supreme Court (*Burlington Northern and Santa Fe Railway Co. v. U.S.* (2009) 129
13 S.Ct. 1870).

14 D. The claims regarding the Shafter Site in this action were stayed and the trial date for
15 the Shafter Site was vacated by stipulation of the parties and the order of this court entered on
16 December 16, 1999. The purpose of the stay was to provide the parties with the opportunity to
17 develop information regarding human and environmental risks posed by the Shafter Site and the
18 feasible alternatives for remediation of the alleged releases or threatened releases of hazardous
19 substances at the Shafter Site.

20 E. On May 21, 2009, DTSC approved the Final Remedial Action Plan, identifying the
21 appropriate remedial actions for the Shafter Site.

22 F. On May 4, 2009, the U.S. Supreme Court issued its decision in *Burlington Northern*
23 *and Santa Fe Railway Co. v. U.S.* (2009) 129 S.Ct. 1870. Among other things, the Supreme
24 Court found that Shell is not a person who, under CERLCA, "arranged" for disposal of hazardous
25 substances at the Arvin Site, and therefore Shell is not liable for U.S. EPA or DTSC's response
26 costs for the Arvin Site. This decision provided new guidance from the Supreme Court on
27
28

1 “arranger” liability under CERCLA. California Health & Safety Code section 25323.5
2 incorporates CERCLA’s definitions of liable parties, including arrangers.

3 Accordingly, the Parties hereby stipulate and agree to the following:

4 1. DTSC’s claims against Dow and Shell, set forth in the Complaint, are
5 dismissed with prejudice.

6 2. Dow’s Counterclaims against DTSC are dismissed with prejudice.

7 3. Within 30 days of entry of this Stipulation and Order by the court, DTSC will
8 amend the ISE Order to remove Dow and Shell.

9 4. Dow and Shell may not recover any costs, expenses, attorneys’ fees or other
10 monetary recovery from DTSC in connection with the claims that are dismissed by this
11 Stipulation and Order or the ISE Order, or any other claims arising from the releases or threatened
12 releases of hazardous substances at and from the Shafter Site alleged in the Complaint.

13 5. DTSC may not recover any costs, expenses, attorneys’ fees or other monetary
14 recovery from Dow or Shell in connection with the claims that are dismissed by this Stipulation
15 and Order or the ISE Order, or any other claims arising from the releases or threatened releases of
16 hazardous substances at and from the Shafter Site alleged in the Complaint.

17 6. This Stipulation and Order shall have no effect on DTSC’s claims in this action
18 against Hercules and BNSF Railway, nor shall it have any effect on Hercules and BNSF
19 Railways’ defenses to those claims.

20 7. This Stipulation and Order shall have no effect on claims in this action that the
21 Stipulating Defendants have filed against each other, nor shall it have any effect on the
22 Stipulating Defendants’ defenses to such claims.

23 8. In all respects other than consideration and entry of this Stipulation and Order,
24 and except as otherwise requested by the parties in the Supplemental Joint Status Report filed
25 October 23, 2009 or as may be ordered by the court, the stay shall be continued, so that DTSC
26 and remaining defendants may initiate settlement discussions among themselves regarding the
27 remaining claims in the action for the Shafter Site.
28

1 9. This Stipulation may be signed in counterpart and facsimiles of signatures, or
2 signatures on a portable document format (pdf) copy of the stipulation, shall have the same force
3 and effect as originals.

4 10. The signatories are authorized to sign and bind the parties for whom they are
5 signing.

6 IT IS SO STIPULATED.

7 Dated: 11/13/09

8 EDMUND G. BROWN JR.,
9 Attorney General of the State of California
10 KEN ALEX
11 Senior Assistant Attorney General

12 _____
13 /s/ Sandra Goldberg
14 SANDRA GOLDBERG
15 Deputy Attorney General
16 *Attorneys for Dept. of Toxic Substances Control*

17 Dated: November 12, 2009

18 BARG COFFIN LEWIS & TRAPP

19 _____
20 /s/ Marc Zeppetello
21 MARC ZEPPELLO
22 *Attorneys for BNSF Railway Company*

23 Dated: November 12, 2009

24 WENDEL, ROSEN, BLACK & DEAN, LLP

25 _____
26 /s/ Stephen McKae
27 STEPHEN MCKAE
28 *Attorneys for The Dow Chemical Company*

29 Dated: 11-12-09

30 LEWIS, BRISBOIS, BISGAARD & SMITH

31 _____
32 /s/ Michael K. Johnson
33 MICHAEL K. JOHNSON
34 *Attorneys for Shell Oil Company*

35 Dated: November 13, 2009

36 K & L GATES, LLP

37 _____
38 /s/ Edward P. Sangster
39 EDWARD P. SANGSTER
40 *Attorneys for Hercules Incorporated*

41 IT IS SO ORDERED.

42 Date: November 17, 2009

43 _____
44 /s/ OLIVER W. WANGER
45 United States District Court Judge